

MINUTES
FRIDAY – JANUARY 30, 2004

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:05 a.m., on Friday, January 30, 2004, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Ward Shanahan, David Fishbaugh and Susan Kirby Brooke; and Russ Hudson and Dr. Garon Smith (via teleconference)

Board Members Absent: Kim Lacey

Board Attorney(s) Present: Tom Bowe and Kelly O'Sullivan, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher

Department Personnel Present: Jan Sensibaugh, Director (DIR); Tom Livers, Deputy Director; Tom Ellerhoff, DIR; John North, Chief Legal Counsel, Legal Unit (Legal), DIR; David Rusoff, Legal, DIR; Jim Madden, Legal, DIR; Jolyn Eggart, Legal, DIR; Keith Christie, Legal, DIR; Keith Jones, Legal, DIR; John Arrigo, Administrator, Enforcement Division; Art Compton, Administrator, Planning, Prevention & Assistance Division; Steve Welch, Administrator, Permitting & Compliance Division (PCD); Don Vidrine, Chief, Air Resources Management Bureau (ARMB), PCD; Jan Brown, ARMB, PCD; Charles Homer, ARMB, PCD; Eric Merchant, ARMB, PCD; Dave Klemp, ARMB, PCD; Dan Walsh, ARMB, PCD; Victoria Walsh, ARMB, PCD; Debbie Skibicki, ARMB, PCD; Debra Wolfe, ARMB, PCD; John Coefield, ARMB, PCD; Ed Thamke, Chief, Waste & Underground Tank Management Bureau (WUTMB), PCD; Rebecca Holmes, WUTMB, PCD; Jon Dilliard, Chief, Public Water Supply Bureau, PCD; Neil Harrington, Chief, Industrial & Energy Minerals Bureau, PCD; Tom Reid, Water Protection Bureau (WPB), PCD; Eric Regensburger, WPB, PCD

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Diane Lorenzen, Air Pollution Control Advisory Council; Will Selser, Lewis & Clark County P.W.; Don Allen, Western Environmental Trade Association; Michael Kakuk, Montana Contractors Association; Erin Inman, BKBH; Chuck Hansberry, Holland & Hart; Dexter Busby, Montana Refining; Anne Hedges, Montana Environmental Information Center; Gary Amestoy, Amestoy Consulting; Joe Lierow, Bison Engineering

I. ADMINISTRATIVE AGENDA ITEMS

- A. Review and approve minutes of December 5, 2003 meeting.

Dr. Smith MOVED the approval of the December 5, 2003 minutes. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

II. BRIEFING AGENDA ITEMS

- A. CONTESTED CASE UPDATE:

1. Cases assigned to Hearing Officer Kelly O'Sullivan

a. In the matter of applicant **Town of Geraldine's** Montana Pollutant Discharge Elimination System Permit (MPDES) No. MT-002-0826.

Ms. O'Sullivan said she had representations from the parties that the case would settle and the Board could expect to see the settlement documents at its next meeting.

b. In the matter of the request for hearing of **Margrit Matter (BER 2003-10 SUB)** under Mont. Code Ann. Sec. 76-4-126(1).

Ms. O'Sullivan said she received a stipulation to dismiss the case, and that the Board will have the final documents to review at its next meeting.

2. Cases assigned to Hearing Officer Tom Bowe

a. In the matter of **M&W Investments, Inc.** appeal of two subdivision application non-degradation decisions and a deviation request denial (**EQ #01-1457 and #00-1822**).

Mr. Bowe made reference to the language in the agenda for this item, reiterating that an extended period of water quality monitoring is underway.

b. In the matter of **CR Kendall Corporation's (BER 2002-09 MM)** request for a hearing to appeal DEQ's decision to deny a minor permit amendment, under the Metal Mine Reclamation Act.

Mr. Bowe had nothing to add to the update provided in the agenda.

c. In the matter of violations of the Montana Underground Storage Tank Act at the **Former Husky Station**, 13 N. Highway Avenue, Fromberg, Montana (Facility ID #05-11777, FID #645) (**BER 2003-12 UST**).

Mr. Bowe had nothing to add to the update provided in the agenda.

d. In the matter of violations of the Montana Underground Storage Tank Act at **Rhino's, Hwy 93 South**, Florence, Montana (Facility ID #41-00172, FID #692) (**BER 2003-16 UST**).

Mr. Bowe explained that the request for hearing was withdrawn shortly after it was filed and that he had issued an order dismissing the contested case.

B. OTHER BRIEFING ITEMS

1. DEQ Reorganization -- DEQ will brief the Board on realignment of several bureaus and program functions within the department.

Mr. Livers informed the Board that some of the Department's staff had relocated from the Phoenix Building to the old Armory Building. He said that the last legislative session moved the Petroleum Tank Release Compensation Board staff out from the Department and under the direct purview of that Board.

Mr. Livers said the permitting arm of the underground tank group moved from the Remediation Division into the Permitting Division and was consolidated with solid and hazardous waste and asbestos to form the Waste and Underground Tank Management Bureau. He said Subdivisions moved from the Water Protection Bureau to join Public Water Supply in the new Public Water Supply and Subdivisions Bureau.

Mr. Livers explained that in the Planning Division, the water functions had been consolidated into one bureau, the Water Quality Planning Bureau. He said it included all of the TMDL activities. He said the Technical and Financial Assistance Bureau now encompasses the Source Water Protection Program in addition to the State Revolving Fund Programs. Mr. Livers said the new Air, Energy and Pollution Prevention Bureau includes the energy programs, pollution prevention activities, business assistance and the air data management monitoring.

Mr. Livers said the Department would send organizational charts out to the Board members when they became available. The Board also requested state telephone books.

2. Update on TMDL Development.

Mr. Compton reminded the Board of the history of the establishment of the TMDL program and informed the Board that between the beginning of the program and the end of 2001 DEQ had completed approximately 19 TMDLs. He said in 2002 and 2003 DEQ completed 111 TMDLs. Mr. Compton explained DEQ must continue to increase its rate of TMDL development. There is a legislative deadline for completion of TMDL development by 2012 and a District Court order to complete them all by 2007.

Mr. Compton said the implications of speeding up TMDL development could include less time spent collaborating and interacting with local constituencies such as watershed groups and conservation districts.

Mr. Hudson inquired as to how priorities are set. Mr. Compton confirmed that priorities are sometimes shifted to avoid conflicts with planned land use activities down the road.

Mr. Shanahan commented that Idaho might have already completed its TMDLs. Mr. Compton explained that Idaho is operating under a consent decree. He said they have about 300 completed, or about one quarter of their total, and are about halfway through their allotted time from the consent decree.

Mr. Livers assured the Board they would be updated at least a couple times a year, or sooner if there was significant development.

III. ACTION AGENDA ITEMS

A. REPEAL, AMENDMENT OR ADOPTION OF FINAL RULES:

1. In the matter of the amendment of ARM 17.24.201, 17.24.202, 17.24.203, 17.24.206, 17.24.207, 17.24.212, 17.24.213, 17.24.214, the adoption of new rules I through X, and the repeal of 17.24.204, 17.24.205, and 17.24.215 pertaining to opencut mining.

Mr. Harrington explained that this was part of a process that began a few years ago. He said the formal comment period was last fall and included a hearing in which there was very little public participation. He said the proposed final notice includes comments received and the DEQ's proposed responses for the Board. Mr. Harrington also said there were some changes, mostly minor, as a result of the comments.

Chairman Russell asked if any member of the public wanted to comment on the matter. No one responded.

Chairman Russell called for a motion to approve the amendments, adopt the Presiding Officer's report and the 311 analysis. Mr. Fishbaugh so MOVED. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.

B. INITIATION OF RULEMAKING AND APPOINTMENT OF HEARING OFFICER:

1. In the matter of the request to initiate rulemaking to adopt a new section of the nondegradation rules (ARM 17.30 sub-chapter 7).

Mr. Regensburger said the proposed rule modification was part of the Department's continuing effort to improve the nondegradation review process for subdivisions. He said the proposed rule provides detailed guidance on the information needed to classify a subsurface wastewater treatment system as a Level 2 treatment system; provides vendors and manufacturers a clear goal to attain; and provides more consistency of the regulatory review of the nitrogen reducing wastewater systems.

Mr. Regensburger handed out a scoring sheet to Board members. He explained that the copies sent previously to the Board members who were not present in the room contained some errors with regard to section numbers. He provided the corrections. Mr. Regensburger said the scoring sheet would allow vendors and manufacturers to determine if they have sufficient data and system specifications to meet the rule requirements, hopefully reducing the number of incomplete applications.

Mr. Regensburger said another improvement was the addition of two new categories of nitrogen reducing wastewater systems, Level 1a and Level 1b wastewater treatment categories.

Discussion commenced regarding the rules' effects on current wastewater systems and about systems that have been part of the rulemaking process.

Chairman Russell opened the floor for public comment. No one responded.

Mr. Shanahan MOVED to initiate the rulemaking, to appoint Mr. Bowe as the hearing examiner, and to have the hearing on March 24, 2004.

Dr. Smith commented on some grammatical errors in the notice because the word "data" is plural. Chairman Russell requested the errors be corrected. Mr. Shanahan reiterated his motion. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

2. In the matter of the request to initiate rulemaking to amend ARM 17.8.748 and 767 to require applicant use of a Top-Down BACT analysis procedure for Montana air quality permit applications and incorporate by reference the Montana Top-Down Best Available Control Technology (BACT) Analysis Process and Procedures Manual - 2004 Edition.

Mr. Homer said that this rule stemmed from the order the Board issued in the Roundup Power appeal. He said the Board directed the Department to prepare a rule that would require applicants to do a top-down BACT analysis. Mr. Homer provided some background information on BACT. He said the top-down process for BACT was developed for permitting actions for major sources by the EPA and presented in a draft workshop manual, the NSR Manual.

Mr. Homer said the top-down BACT process, simplified, consists of five steps: 1) identify control technologies or techniques; 2) eliminate technically infeasible options; 3) rank the remaining control technologies by effectiveness; 4) evaluate effective controls and document the results; and 5) designate the top option not eliminated as BACT. He said the Department looked at several other states in this region and didn't find any that required a top-down BACT process. Maine has a five-step process that uses these same steps.

Mr. Homer explained that the proposed rule consists of changes to ARM 17.8.748 and would require applicants to provide a top-down BACT analysis as part of their permit applications. The rule also specifies that the analysis must be done in accordance with a Montana top-down BACT manual, a 40-page manual that would be incorporated by reference in the rule and also in ARM 17.8.767.

Mr. Homer explained that by incorporating the manual by reference, any changes in the manual would have to be brought before the Board for approval. He said the process outlined in the manual would apply to all permitting actions within whatever the selected universe would be, but that it would not apply to the portion of an application for a nonattainment area for a particular pollutant, since those areas require a different standard to meet known as Lowest Achievable Emission Rate or LAER, not BACT.

Mr. Homer explained that the proposed rule includes three alternatives: 1) apply this to every application for a Montana air quality permit resulting in increased emissions; 2) place this requirement on all sources subject to Subchapter 12, which is the Title V program; or 3) apply this only to the major sources that are subject to EPA's NSR manual.

Mr. Homer said two additional options are included in the Montana top-down BACT manual: 1) the Department would not use the top-down BACT requirement to redefine the process; or 2) the top-down BACT requirement could be used to redefine the process considering available control technologies.

Mr. Homer referenced a memo from the Air Pollution Control Advisory Council (APCAC) to the Board notifying them that APCAC would prefer the rule not be initiated.

Board members asked questions and discussed the proposal and heard comments from the public.

Mr. Klemp explained the difference between how the draft NSR manual was being used and how the new manual would be used.

Mr. Shanahan commented that a recent United States Supreme Court opinion states that the top-down method is not required by law or rule, but is a recommended methodology.

Ms. Lorenzen, APCAC, believed the proposed rule would increase the quantity of the analysis, not the quality, and would consume resources. She said APCAC discussed other things that might strengthen DEQ's hand in the process, such as providing more training to DEQ staff about equipment, control technology and air pollution control.

Mr. Hansberry, Holland and Hart Law Firm, discussed the recent Supreme Court case involving Alaska versus EPA. He believes the proposed rule is more stringent than the federal rule and that it would require a HB 521 analysis. He said that once you adopt a very lengthy process in a rule, you open yourself to more challenges. He urged the Board to consider leaving top-down BACT as guidance for DEQ to follow. Further discussion took place regarding the Alaska versus EPA case.

Mr. Allen, WETA, believed the change in the rule as proposed would require a HB 521 analysis and that WETA would insist on one being done. He urged the Board to not move forward with the rule at this time. Mr. Allen was concerned that a hearing notice was already prepared with a hearing date. He suggested that the Board should preside over the hearing, rather than a hearing officer.

Ms. Hedges, MEIC, handed out her written testimony and said MEIC supported Alternative 1 of the proposed amendment. She said the proposed rule and guidance document should be applied to all sources, large and small, and provided several reasons including: 1) all sources that have to receive air quality permits must comply with BACT and the definition of BACT does not change based on the size of a facility; 2) small sources would benefit from guidance just as much as large sources; 3) the Department also needs to document its BACT analysis and determination of small sources; 4) applying BACT to large as well as small sources would save Department resources; and 5) it would stop large sources from subsidizing small sources. She did not believe that a 521 analysis would apply.

Mr. Kakuk, attorney for Montana Contractor's Association, believed HB 521 would be triggered prior to adoption of the rule because the federal government does not require top-down and the proposed rulemaking would require it. He expressed concern that under the proposed rule the burden for conducting the five-step top-down written analysis would be shifted to small sources. He suggested coming up with something else to implement BACT for small sources.

Mr. Kakuk said that the Montana Contractor's Association was against Alternative 1, Alternative 2 if it included synthetic minors and Option 2. He suggested more guidance be provided, the scope narrowed and the Board send it back to the Department to get together with the interested parties for more information.

Mr. Shanahan was concerned about adopting a rule when there is already a guideline from EPA. He felt DEQ already has a guideline similar to it, and hoped that it would suffice.

Mr. Bowe said the lesson to be learned from the Alaska case is that they need to have a record to support the decision made. He said an objective of the proposed rulemaking is to ensure the administrative record was of higher quality, and provided better information to the decision maker and the public as to the basis for the BACT determination.

Dr. Smith favored initiating the rulemaking with all the alternatives and options to provide the Board with the widest possible testimony.

Discussion commenced regarding: the definition of BACT; Option 1 versus Option 2; and the Department's working with APCAC.

Mr. Hudson recalled that at the hearing it was concluded that the decision reached would have been the same even if a rule had been in place. He said the concern was the deficiency of the documentation by the Department. He felt the issue was now much larger than he had envisioned when the Board made its request. He felt the Board had only asked for a strengthening of the documentation of how the steps were taken and he was hesitant to initiate rulemaking at this time.

Ms. Brooke agreed with APCAC that the money could be better spent on BACT analysis review training for Department staff.

Mr. Hudson suggested that the Board might not have provided enough guidelines for the Department on what the Board wanted. He suggested that future requests should be more specific.

Dr. Smith MOVED to initiate the rulemaking. A SECOND was not made.

Mr. Hudson MOVED to not initiate the rulemaking. Mr. Shanahan SECONDED the motion. The motion CARRIED with a 4-2 VOTE.

Dr. Smith requested that the Department develop a mechanism to capture in a formal fashion some assurance that a complete record will be in place.

C. FINAL ACTION ON APPEALS:

1. In the matter of the Notice of Violation and Statement of Proposed Penalty issued to **Mission Valley Concrete Industries, Inc. (BER 2003-11 OC)**.

Mr. Bowe explained that the parties reached a settlement prior to the scheduled hearing date. He said an Order of Dismissal was included in the packet.

Ms. Brooke MOVED to authorize the Chairman to sign the Order of Dismissal. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

D. NEW CONTESTED CASE APPEALS:

1. In the matter of violations of the Montana Underground Storage Tank Act at **Helmet of Salvation Shelter**, 65 Archrus Road, Emigrant, Montana [Facility ID #34-13180 (FID #724)] (**BER 2003-13 UST**).

Mr. Bowe said the hearing date is scheduled for July, but that he received a letter indicating that the parties expect to reach a settlement. He said it was appropriate in the meantime to appoint him as the permanent hearing examiner.

Mr. Shanahan MOVED to appoint Mr. Bowe as the permanent hearing examiner. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

2. In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to **Flying J Petroleums, Inc.** (**BER 2003-14 HW**).

Mr. Bowe expected the hearing to be held in mid summer, though the date had not yet been confirmed. He said a schedule was set through June 30. He said the Board could appoint him to hear the case or the Board could choose to hear the case itself. Discussion commenced regarding the volume of materials for this case that were included in the Board packet.

Ms. Brooke MOVED to appoint Mr. Bowe as the permanent hearing examiner. Dr. Smith SECONDED the motion. The motion CARRIED with a unanimous VOTE.

3. In the matter of the request for hearing of **Four Corners Community Foundation** on the amendment of Permit No. SIM-001 issued to **Dennis Simpson**, Gallatin County, Montana (**BER 2003-15 OC**).

Mr. Bowe said he had issued various orders and that the hearing was to be held sometime after May 17, 2004.

Mr. Shanahan MOVED to appoint Mr. Bowe as the permanent hearing examiner. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

4. In the matter of the Maximum Achievable Control Technology approval for the Air Quality Permit for the **Roundup Power Project** (Permit No. 3182-00) (**BER 2003-17 AQ**).

Mr. Bowe said that since the agenda was prepared, the parties have discussed some changes in the schedule, including moving the hearing to April 20.

Mr. Hudson MOVED that the Board appoint Mr. Bowe as the permanent hearing examiner. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

5. In the matter of violations of the Water Treatment Plant Operators Laws by **Danny L. Holbrook**, 111 Jack Street, Billings, Yellowstone County, Montana, Operator License #3808 (FID #682) (**BER 2003-18 WTPO**).

Mr. Bowe said that since the agenda was prepared, he had been informed that the parties were working on a settlement. He recommended that Ms. O'Sullivan be appointed as permanent hearing examiner.

Mr. Shanahan MOVED that Ms. O'Sullivan be appointed permanent hearing examiner. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

IV. GENERAL PUBLIC COMMENT

Under this item, members of the public may comment on any public matter within the jurisdiction of the Board that is not otherwise on the agenda of the meeting. Individual contested case proceedings are not public matters on which the public may comment.

Chairman Russell asked if any member of the audience would like to comment on any matter that could or should come before the Board. There was no response.

A brief discussion took place regarding the Outstanding Resource Water (ORW) designation for the Gallatin River and the lack of funding for conducting the EIS.

V. ADJOURNMENT

Ms. Brooke MOVED that the Board ADJOURN. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE and the proceedings concluded at 10:50 a.m.

Board of Environmental Review January 30, 2004 Minutes Approved:

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

DATE